

# CRITICAL CRITERIA

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## **QUALITY ASSURANCE PROGRAM PROGRAMME D'ASSURANCE DE LA QUALITÉ**

QAP Critical Criteria  
Relating to  
ACCOUNTABILITY STANDARDS

### **Critical Criteria**

#### **Background to the Critical Criteria**

Legal Aid Ontario (LAO) is committed to working with the clinic system to ensure the delivery of high quality legal aid services in a cost effective and efficient manner. In order to meet this goal, LAO's Quality Assurance Program (the "QA Program") supports community legal clinics in continuously improving the quality of their services. The QA Program does this in two primary ways. First, it has developed quality assurance criteria and indicators, and measures whether clinics are meeting them. Second, the QA Program supports clinics by developing better practices, distributing information bulletins, and providing resources and advice in the area of quality improvement.

The critical criteria set out in this document arise out of the QA Program's role in measuring whether clinics are meeting QA criteria, and in particular, out of LAO's need to be informed when a serious problem arises in a clinic. In order to carry out its "measuring" function, staff of the QA Program conduct site visits to review clinics. The QA Program provides clinics with reports on its findings, commending clinics in the areas in which they excel, and making recommendations in areas where a clinic is not meeting QA criteria. The reports are intended to recognize the many areas in which clinics provide high quality services, and to assist clinics in improving their services where necessary.

While the vast majority of the QA Program's findings confirm that clinics are providing high quality services, it must be recognized that serious concerns can arise. It is important to both LAO and the clinics to establish a clear process for identifying and responding to those situations. In some cases, the

## CRITICAL CRITERIA

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concerns can be addressed through the regular QA Program process of making recommendations and monitoring their implementation. In other cases, the QA Program Director will need to inform LAO management and Board of a problem so that it can be addressed quickly and in a way that protects the interests of clients, the public, the clinic system and LAO.

To that end, the LAO Board adopted Accountability Standards that define the circumstances in which the QA Program's findings will be reported to the LAO Board. One of the circumstances requiring a report to the LAO Board is when a clinic has breached a "critical criterion." Those critical criteria have now been defined. The critical criteria are derived from the QA criteria used to measure a clinic's performance during a site visit. They are defined in terms that reflect the seriousness of a breach from the perspective of both the clinic system and LAO.

### The Critical Criteria

A breach of any one of the following six critical criteria will result in a critical criteria report being forwarded to the LAO Board. The six standards are not in any order of seriousness. The commentary after the critical criteria is meant to inform and qualify their interpretation.

The guiding principles governing the LAO Board's actions upon receiving a critical criteria report are set out in Appendix A. The process governing the QA Program in reporting on the breach of a critical criterion is set out at Appendix B.

#### **1. Failure to Provide Clinic Services**

(reference criteria 2.4, 2.5, 4.2, 7.1, 7.2, 7.6, 8.1)

- i. Clients are consistently unable to access clinic services in person or by telephone because hours of operation are severely restricted and this will result in a significant impairment of the clinic's ability to function or provide service.
- ii. Provision of client services is unjustifiably restricted and there is no improvement foreseeable and this will result in a significant impairment of the clinic's ability to function or provide service.

### **Commentary**

QAP staff will first assess whether adequate steps exist which have not been taken by the clinic to remedy the problem, or whether the clinic board is

## CRITICAL CRITERIA

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incapable of or unwilling to remedy the problem, before the QA Program Director decides to send a critical criteria report to the LAO Board.

The words "consistently," "unjustifiably," and "no improvement foreseeable" are included in this critical criterion to indicate that this criterion would be limited to extreme situations, and that, generally, the clinic would have an opportunity (i.e., recommendations with timelines) to remedy the situation.

To determine whether the amount of client services is "unjustifiably restricted" it would be helpful to have an objective figure. The intention of this bullet is to capture a situation in which the amount of client services is so small that the effect is a denial of service to clients. However, there are many factors that need to be considered in making this determination. For example, geographic area, areas of law practised, changes in legislation, importance of outreach work at the time, staffing issues, and planning directions from the board may all affect the quantity of client services provided by a clinic. One of the areas that will be considered is whether the number of files is unjustifiably small in comparison to other clinics of similar size and similar areas of law, or in comparison to the clinic itself in previous years (assuming the clinic was fully staffed during these years). In determining whether the number of files is unjustifiably small, QAP staff will consider the clinic's overall situation, including external factors that may affect demand for service, and the complexity of the casework or other services being provided by the clinic.

When QAP staff consider whether a clinic has taken adequate steps to remedy the problem, they will look at whether there were things that the clinic could reasonably be expected to have done to remedy the problem but failed to do. In considering what is reasonable QAP staff would assess what could be accomplished within the clinic's existing or available resources, expertise, and area of responsibility, or whether the solution required a more systemic approach involving the clinic system or LAO. They would look at whether the clinic has developed an action plan to deal with the situation, whether the plan itself is adequate, and if adequate, whether the clinic has implemented the steps as outlined in the plan, that is, whether it has followed up with its plan.

## **2. Serious Financial Mismanagement**

(reference criteria 1.1.A, 1.3, 1.4.B, 2.1)

- i. Evidence of fraud or misrepresentation in the clinic's financial affairs
- ii. Irregularities with respect to trust funds resulting in unexplained discrepancies

## CRITICAL CRITERIA

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- iii. **Clinic funds used for personal matters or expenses unrelated to the clinic and there are no appropriate policies and practices that control the use and recovery of these funds**

### **Commentary**

This criterion is not meant as a way for QA reviewers to second-guess the work of the clinic auditor. It is meant to cover a situation revealed during a quality assurance review interview, or which involves other source funding not subject to the LAO audit.

Misrepresentation is not simply making a mistake; it involves an intent to deceive or mislead, or a negligence or wilful blindness as to the accuracy of a statement or fact.

The LAO Board as a public funder has certain responsibilities to the government that provides the funding and to the public in general. These responsibilities can only be exercised if the LAO Board receives timely information about any situation regarding the expenditure of public funding, when there is a potential that such a situation could lead to grave consequences. Thus, the LAO Board has a right to be informed about evidence of fraud or misrepresentation in the clinic's financial affairs, regardless of whether the clinic board has adequately addressed the problem, and regardless of whether the breach has resulted in a significant impairment of the clinic's ability to function or provide service.

Bullet 2.iii is not intended to imply that the personal use of significant amounts of clinic resources or funds by clinic staff is appropriate in any circumstances. Clinics are provided with funding from LAO in order to provide services to their communities, and their resources should be used for that purpose. However, bullet 2.iii recognizes that clinics need some flexibility to set policies governing the limited and occasional personal use of clinic resources and funds by staff. For example, if clinics choose to allow staff to make personal use of the office photocopier or telephone, a policy should be in place to limit, monitor and promptly recover payment for the personal use of those resources. Bullet 2.iii will apply in situations where clinic staff are making personal use of clinic funds or resources, and the clinic either does not have an adequate policy controlling that use, for example by setting appropriate limits, or is not enforcing the policy.

## CRITICAL CRITERIA

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### 3. Misconduct or Professional Negligence

(reference criteria 4.2, 7.1, 7.2, 7.3, 7.4, 8.1)

- i. Serious professional misconduct committed in the course of employment by the clinic that requires reporting pursuant to Rules 6.01 and 6.09 of the *Rules of Professional Conduct*<sup>1</sup>
- ii. Serious misconduct on the part of non-lawyer staff committed in the course of employment, which, if done by a lawyer, would come within Rules 6.01 and 6.09 of the *Rules of Professional Conduct*
- iii. Attempted concealment of negligence
- iv. When there is an obvious and egregious legal error discovered in the review of a client file, summary advice or brief service, that has not been remedied, and that the clinic is unwilling to report to the insurer

### Commentary

Rules 6.01 and 6.09 create distinct reporting obligations for lawyers. Rule 6.01(3) makes it mandatory for a lawyer to report to the Law Society of Upper Canada certain types of serious professional misconduct committed by other lawyers. Rule 6.09 requires lawyers to inform their own clients promptly if they discover an error or omission, and to give notice of potential claims to the insurer.

If a situation requires mandatory reporting to the Law Society of Upper Canada under Rule 6.01(3), a critical criteria report will be forwarded to the LAO Board. Serious professional misconduct can have an adverse impact on clinic clients. Moreover, the funding agreement signed by each clinic requires the clinic to comply with all requirements of the Law Society of Upper Canada. As a publicly funded agency, LAO is accountable to the government that provides its funding and to the public in general. LAO's responsibilities in this regard can only be met if the LAO Board receives timely knowledge of any situation serious enough to necessitate a report to the Law Society of Upper Canada. For the same reasons, the LAO Board needs to be informed under criterion 3(ii) of serious misconduct by non-lawyers working in a clinic that would, if performed by a lawyer, be reported to the Law Society. A breach of criteria 3(i) or (ii) will be reported to the LAO Board regardless of whether the clinic board has adequately addressed the problem, and regardless of whether the breach has resulted in a significant impairment of the clinic's ability to function or provide service.

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<sup>1</sup> See: Appendix C, Rules 6.01(3) and 6.09 of the *Rules of Professional Conduct*

## CRITICAL CRITERIA

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A clinic's failure to report an error or omission once it becomes aware of it also will be reported to the LAO Board. Unreported professional negligence by a clinic could affect the entire clinic system's errors and omissions insurance, leading to increased premiums or withdrawal of coverage. This has adverse consequences for the individual clinic, the entire clinic system, and LAO's ability to provide legal aid services to the public.

Attempted concealment of negligence requires intent by the clinic or a clinic staff person. It would include concealment of negligence from the client and/or failure to report the matter to the insurer. There may be situations when QAP staff think there is negligence and the clinic does not agree. There also may be situations when the clinic agrees there is negligence but does not want to invoke the insurance coverage, since it does not believe that the client will complain, or that there will be any damages. Whether or not the clinic's conduct will be characterized as a breach of critical criterion 3(i) or 3(iii) depends on whether the error or omission may reasonably be expected to involve liability to the client for professional negligence.

### **4. Significant Personnel Problems**

(reference criteria 1.3, 1.4.B, 1.5.B, 2.2, 4.4)

- i. **Staff's competence is substantially impaired and client interests are negatively impacted**
- ii. **Inappropriate staff behaviour that affects the work of the clinic to such an extent that client interests are negatively impacted**
- iii. **Inability to maintain full staffing for an extended period of time significantly impacts the clinic's ability to function or provide service**
- iv. **Staff morale or working relationships significantly impacts the clinic's ability to function or provide service**

### **Commentary**

QA staff will first assess whether adequate steps exist, which have not been taken by the clinic to remedy the problem, or whether the clinic board is incapable of or unwilling to remedy the problem, before the QAP Director decides to send a critical criteria report to the LAO Board.

QAP staff recognize that as employers, legal clinics have a duty under human rights legislation to accommodate employees who have a disability (the form of which may include, among other things, substance abuse or mental illness). A clinic must accommodate the employee with a disability, unless it can show that to do so would result in undue hardship to the clinic.

## CRITICAL CRITERIA

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Accordingly, QAP staff will consider factors such as the efforts that a clinic has taken to fulfil its duty under the law towards the employee. The issue under bullet 4.i. is not the staff person's impairment, but the failure of the clinic to take necessary action including accommodation, discipline, termination, etc.

Inappropriate staff behaviour that affects the work of the clinic to such an extent that client interests are harmed, can be a very subjective issue influenced by one's gender, race, class, and social upbringing. Stereotypes about people of different racial backgrounds, women, gays and lesbians, etc., can be used to justify the denial of their career advancement. A criterion founded on "inappropriate behaviour" could reinforce some of these stereotypes. Bullet 4.ii is meant to address the type of behaviour that would be inappropriate in the work place, regardless of the culture or background of the staff person. A few examples of this type of behaviour would include the following: shouting at clients so that clients are afraid to speak, hitting clients or threatening to hit them, using abusive language to intimidate, refusing to speak to clients or other staff, refusing to meet with anyone, refusing to attend hearings, etc.

Bullet 4.iv, dealing with "staff morale or working relationships substantially impede the clinic's ability to function," is meant to address both internal and external working relationships. An example of an external working relationship would be the clinic's or a clinic staff member's relationship to another community organization or staff of that other organization.

When QAP staff consider whether a clinic has taken adequate steps to remedy the problem, it would look at whether there were things that the clinic could reasonably be expected to have done to remedy the problem but failed to do. In considering what is reasonable QAP staff would assess what could be accomplished within the clinic's existing or available resources, expertise, and area of responsibility, and whether the solution required a more systemic approach involving the clinic system or LAO. It would look at whether the clinic has developed an action plan to deal with the situation, whether the plan itself is adequate, and if adequate, whether the clinic has implemented the steps as outlined in the plan, that is, whether it has followed up with its plan.

## CRITICAL CRITERIA

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### **5. Board Functions Usurped**

(reference criteria 1.1.B, 1.3, 1.4.A, 1.4.B, 1.5.A, 1.5.B)

- i. **Board president or other board member recurrently gives direction to ED that contradicts or overrides decisions of board.**
- ii. **On a consistent basis, ED disregards board's direction without reporting back to the board.**

### **Commentary**

QA staff will first assess whether adequate steps exist, which have not been taken by the clinic to remedy the problem, or whether the clinic board is incapable of or unwilling to remedy the problem, before the QAP Director decides to send a critical criteria report to the LAO Board.

Bullet 5.i. is meant to capture a situation in which the board allows the board president or a board member to control the clinic. The ED's hands remain tied because the other board members are unable or unwilling to confront the president or other board member in question.

Boards, which are responsible for the overall management of the clinic, must strike a balance between allowing the executive director sufficient independence to be responsible for the day-to-day management of the clinic and monitoring the executive director to ensure that s/he is carrying out the delegated responsibilities. These responsibilities would include following policies and procedures developed by the board. In order to monitor the clinic's progress to ensure that the delegated activity is on schedule and to detect any problems, the board must ask for and receive adequate information from the executive director.

When QAP staff consider whether a clinic has taken adequate steps to remedy the problem, it would look at whether there were things that the clinic could reasonably be expected to have done to remedy the problem but failed to do. In considering what is reasonable QAP staff would assess what could be accomplished within the clinic's existing or available resources, expertise, and area of responsibility, and whether the solution required a more systemic approach involving the clinic system or LAO. It would look at whether the clinic has developed an action plan to deal with the situation, whether the plan itself is adequate, and if adequate, whether the clinic has implemented the steps as outlined in the plan, that is, whether it has followed up with its plan.



## CRITICAL CRITERIA

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### **6. Misrepresentation**

(reference criteria 1.4.A, 5.2, 6.1, 6.2, 7.2, 7.3, 7.4, 8.1, 9.2, 9.3)

- i. **Intentional falsification of statistical or other information provided to LAO about the work performed by the clinic**

### **Commentary**

This criterion and the bullet are not intended to apply to inadvertent mistakes by the clinic or third parties, or to situations where a clinic has been misled by a client.

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# CRITICAL CRITERIA

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## Appendix A

### Guiding Principles

Once a critical criteria report regarding a clinic has been issued, the Clinic Committee of the LAO Board will expect that appropriate LAO staff will become involved in helping the clinic to solve the problems identified in the report. The Vice President of Clinics and Special Services will be responsible for involving the appropriate LAO staff in order to develop a strategy for addressing the problems. The QA Program Director, together with the Vice President of Clinics and Special Services, will be responsible for providing the LAO Board with the critical criteria report and with any strategies that have been developed to solve the problems identified in the report.

LAO's Senior Management Committee recommended that the following principles be adhered to in addressing problems identified in a critical criteria report:

1. LAO, by providing funding to the clinic in the first place, made a determination that the clinic was essential as a means of providing legal aid services to the community.
2. LAO's goal and commitment is to restore services to the level and competence that existed before any problems were identified.
3. The Clinic Committee will want the Vice President of Clinics and Special Services to provide them with a strategy or a range of options for solving the clinic's problems. In order to do this, the Vice President of Clinics and Special Services will have to involve the clinic's executive director and board president in developing and presenting suitable options that will work for the clinic.
4. LAO will always select the least disruptive and most supportive solution: the less intervention the better. Defunding is the last and least desirable outcome and will rarely be considered.

## CRITICAL CRITERIA

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### **Appendix B** **Process Followed by the QA Program when a** **Clinic Breaches a Critical Criterion**

Under the LAO Accountability Standards, the QA *report* could include a critical criteria report, the post-site visit reporting letter, the draft and/or the final QA report.<sup>1</sup> If a situation at a clinic comes within the ambit of one or more critical criteria, it may not be appropriate to wait until a final report is prepared to disclose this information to the LAO Board, as delay could seriously prejudice clients, the clinic or the clinic system. Therefore, when a clinic has failed to meet one or more of the critical criteria, the following process will apply:

- 1) If during the process of a QA review, a QA reviewer identifies an issue relating to a critical criterion or criteria, s/he will forthwith notify the clinic's executive director and the entire clinic board and will interview all persons involved with the issue(s) and examine all documents relating to the critical criterion or criteria.
- 2) The QA reviewer will forthwith consult with the QA Program Director to determine if, in his/her opinion, a critical criterion or criteria has been breached.
- 3) Once the QA reviewer and QA Program Director determine that the clinic may have breached a critical criterion or criteria, the reviewer will forthwith prepare a draft critical criteria report detailing the critical area and the result of the interviews and document review. S/he will refer to the QA criteria and indicators in the *QA Manual* and describe how the clinic has failed to meet these criteria and indicators.

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<sup>1</sup> The variety of reporting formats listed here reflects the need for flexibility and timeliness in reporting site visit findings to clinics and, in the case of a critical criteria breach, to the LAO board. When the QA Program began reviewing clinics, a draft report was to be sent to the clinic within 6 weeks of a site visit. It soon became apparent that this time frame was not realistic given the comprehensiveness and complexity of the QAP review process. The practice of sending a post-site visit reporting letter was established in 2000 in order to provide clinics with a written summary of the reviewer's preliminary findings and recommendations within 10 working days of a site visit. The addition of "critical criteria reports" as a reporting format is based on the need for the QA Program to respond quickly when it finds that a clinic has breached a critical criteria, while still giving clinics an opportunity to respond to the reviewer's findings. The critical criteria report is intended to focus on the specific area or areas of concern relating to the critical criteria, and to provide the LAO board with any additional information about a clinic that it needs in order to understand the broader context in which the issue arises. For example, it would be important for the LAO board to know that a clinic is functioning well in areas other than those related to a specific critical criterion.

## CRITICAL CRITERIA

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- 4) The draft critical criteria report will forthwith be reviewed by the QA Program Director to ensure its accuracy and reliability.
- 5) The QA Program Director will forward the draft critical criteria report to the ED and the board of the clinic so as to provide notice to the clinic that the draft critical criteria report will be forwarded to the LAO Board, or to whatever department they designate. The clinic will be given the opportunity to correct factual errors in the draft critical criteria report. This will not be an opportunity, however, for the clinic to explain how it intends to address the concerns raised in the draft critical criteria report. The clinic will provide its response within ten working days from the date that the draft critical criteria report is sent to it, unless the situation is deemed by the QA Program Director to be so serious that a response is required within fewer than ten days.
- 6) The QA Program Director will review the clinic's response within 5 days of receiving it. Unless the clinic's response reveals that a factual or other error has occurred, such that the QA Program Director concludes that the clinic is not in breach of a critical criterion, the draft critical criteria report will become final.
- 7) When the critical criteria report becomes final, the QA Program Director will immediately forward it to the Vice President of Clinics and Special Services, who will be responsible for developing a strategy to address the problem in co-operation with the QA Program, other appropriate LAO staff, and the clinic. In addition, the QA Program Director and the Vice President of Clinics and Special Services are responsible for providing the critical criteria report, together with any strategies that have been developed, to the Clinic Committee of the LAO Board in accordance with the requirements set out in the Accountability Standards. Where the report is forwarded to the LAO Board, a copy of the clinic's response will be included. Copies of all documentation submitted to the LAO Board will be provided to the clinic board as well.
- 8) Once a critical criteria report regarding a clinic has been forwarded to the Clinic Committee, it will determine how to address the issues identified in the critical criteria report, taking into account recommendations made by the clinic, the QA Program and the Vice President of Clinics and Special Services.

# CRITICAL CRITERIA

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## Appendix C Rules of Professional Conduct

### **Duty to Report Misconduct**

**6.01 (3)** A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege:

- (a) the misappropriation or misapplication of trust monies;
- (b) the abandonment of a law practice;
- (c) participation in serious criminal activity related to a lawyer's practice;
- (d) the mental instability of a lawyer of such a serious nature that the lawyer's clients are likely to be severely prejudiced; and
- (e) any other situation where a lawyer's clients are likely to be severely prejudiced.

### **Commentary**

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made bona fide without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental, or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports the Ontario Bar Assistance Program (OBAP), LINK, and other support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for OBAP and other support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

### 6.09 ERRORS AND OMISSIONS

#### Informing Client of Error or Omission

**6.09 (1)** When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall:

- (a) promptly inform the client of the error or omission being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise;
- (b) recommend that the client obtain legal advice elsewhere concerning any rights the client may have arising from the error or omission; and
- (c) advise the client that in the circumstances, the lawyer may no longer be able to act for the client.

#### Notice of Claim

**6.09 (2)** A lawyer shall give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

#### Commentary

The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or the failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case a careful assessment will have to be made of the client's damages arising from the lawyer's negligence. Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred which may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps:

1. Immediately arrange an interview with the client and advise the client that an error or omission may have occurred, which may form the basis of a claim by the client against the lawyer.
2. Advise the client to obtain an opinion from an independent lawyer and that, in the circumstances, the first lawyer might no longer be able to act for the client.
3. Subject to rule 2.03 (Confidentiality), inform the insurer of the facts of the situation.
4. Co-operate fully and as expeditiously as possible with the insurer in the investigation and eventual settlement of the claim.
5. Make arrangements to pay that portion of the client's claim that is not covered by the insurance immediately upon completion of the settlement of the client's claim.

#### Co-operation

**6.09 (3)** When a claim of professional negligence is made against a lawyer, he or she shall assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to

## CRITICAL CRITERIA

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be dealt with promptly.

### **Responding to Client's Claim**

**6.09 (4)** If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer shall expeditiously deal with the claim and shall not take unfair advantage that would defeat or impair the client's claim.

**6.09 (5)** In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance.

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